UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSLYVANIA

AMALGAMATED TRANSIT UNION, LOCAL 1729 Plaintiff, v. FIRST GROUP AMERICA INC. and FIRST STUDENT, INC., Defendants.	)	Case No. 2:15-cv-0806

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE NLRB'S MOTION TO INTERVENE

The National Labor Relations Board ("Board") respectfully submits this Memorandum in support of its motion to intervene in the above-captioned case. By its complaint, the Amalgamated Transit Union, Local 1729 ("Plaintiff" or "ATU") seeks to have this Court enforce an arbitration award, pursuant to Section 301 of the Labor Management Relations Act, 1947, against First Group America Inc. and its subsidiary First Student, Inc. ("First Student"), collectively referred to as "Defendants." The arbitration award conflicts with a Board decision that Teamsters Local 205 ("Teamsters") is the appropriate bargaining representative of the employees in question. Accordingly, the Board has a significant interest in this proceeding, and this Court should grant the Board's motion to intervene either as of right, *see* Fed. R. Civ. P. 24(a)(2), or permissively, *see* Fed. R. Civ. P. 24(b)(2).

BACKGROUND

A. Facts

First Student, which employs drivers to shuttle students between home, school, and

extracurricular activities, operates a number of facilities in the United States and Canada.[1] Historically, the Teamsters represented drivers who operated out of the Rankin, Pennsylvania facility ("Rankin facility"), and served the Woodland Hills School District ("Woodland Hills") and the City of Pittsburgh School District ("City of Pittsburgh"). Meanwhile, ATU represented drivers who operated out of a facility on Old Frankstown Road in Pittsburgh, Pennsylvania ("Frankstown facility") and served the Gateway School District ("Gateway") and the Penn Hills School District ("Penn Hills").

Prior to the 2013-2014 academic year, First Student learned that Gateway would not renew its contract for services. This change led First Student to close its Rankin facility, which it had rented, and move the Woodland Hills and City of Pittsburgh buses and drivers to the Frankstown facility, which it owns. Per the recognition language in its contract, the Teamsters notified First Student that it would follow the work to the Frankstown facility. First Student so advised ATU. During the 2013-2014 academic year, drivers represented by the Teamsters and ATU both worked out of the Frankstown facility.

Near the end of the academic year, Penn Hills, the only remaining client at the Frankstown facility served by ATU-represented drivers, terminated its contract with First Student. So, on or about June 30, 2014, First Student laid off all of the ATU-represented drivers.

On June 11, 2014, ATU filed a grievance stating that First Student improperly assigned several newly acquired Woodland Hills routes to Teamsters-represented drivers. ATU based its grievance on the recognition clause in Article I of its collective bargaining agreement ("CBA"), which described the ATU unit as all drivers "employed by [First Student] at its terminal located

[1] First Student also employs monitors and mechanics who are not covered by the grievance or arbitration award and thus are irrelevant to the present Section 301 action.

at 101 Old Frankstown Road, Pittsburgh, Pennsylvania." The parties, unable to settle, went to arbitration in which the Teamsters were not permitted to participate.

On February 11, 2015, the arbitrator issued an award that directed First Student "to cease and desist from violating Article 1" of its CBA with ATU and ordered that "the laid off ATU employees shall be recalled in seniority order for the additional work at the Frankstown Terminal, and each adversely affected employee shall be made whole for all lost wages, benefits, and seniority."

B. Board Proceedings

On June 15, 2015, in accordance with Section 9 of the National Labor Relations Act, 29 U.S.C. § 159, First Student filed a petition for election ("RM petition") and a unit clarification petition ("UC petition") with the Board's Region 6 office in Pittsburgh, Pennsylvania.[2] The RM petition asserted that ATU and the Teamsters presented First Student with competing claims for representation and that First Student possessed a good faith uncertainty that a majority of its employees supported ATU. The UC petition asserted that all First Student's drivers, some of whom were previously represented by ATU, should be accreted into a single unit represented by the Teamsters.

On September 4, 2015, the Board's Regional Director for Region 6 ("RD") issued a Decision and Direction of Election as to the mechanics, *see supra* note 1, but otherwise dismissed the RM petition, finding, in relevant part, that there was no existing question concerning representation. The RD determined that the work performed by ATU-represented employees ceased on June 30, 2014, when Penn Hills ended its contract with First Student. The RD found that when First Student assigned the additional Woodlands Hills routes to the

[2] The RM and UC petitions included "[a]ll drivers, monitors and mechanics at the Old Frankstown Road facility."

Teamster-represented drivers, "consistent with the historical division of work according to school district . . . , the extra Woodland Hills work merely resulted in an expansion of the existing Teamsters-represented unit." (Doc. 22-3, p. 7). Even though some drivers formerly represented by ATU were hired for the additional Woodland Hills work, the RD concluded there "were too few [new unit members] to create a question concerning representation." (*Id.*).

The RD also dismissed the UC petition that same day on the ground that the accretion doctrine was inapplicable to the circumstances of the case because the prerequisites to accretion—an integration of operations or changed circumstances—did not occur. The RD found that the Teamsters-represented drivers and the ATU-represented drivers remained segregated even after the merger at the Frankstown facility, and there was no integration until First Student lost the Penn Hills contract, laid off the ATU-represented drivers, gained the additional Woodland Hills routes, and accepted former ATU-represented drivers into the Teamsters' unit. "Rather than viewing these events as a basis for accretion," the RD concluded "that there was merely an expansion of the existing Teamsters-represented bargaining unit that does not require a unit clarification." (*Id.* at 35).

On October 9, 2015, ATU filed a request for Board review of the RD's Decision, which First Student opposed. On January 14, 2016, the Board denied ATU's Request for Review in a one-sentence order, finding "it raises no substantial issues warranting review." Under the Board's Rules and Regulations, denial of a request for review "constitute[s] an affirmance" of the RD's decision. 29 C.F.R. § 102.67. Thus, the RD's Decision is now effectively a decision of the Board.

C. District Court Proceedings

On June 19, 2015, four days after First Student filed its RM and UC petitions with the Board's regional office, ATU filed suit in this Court for enforcement of its arbitration award, pursuant to Section 301 of the Labor Management Relations Act, 1947, 29 U.S.C. § 185, *et. seq.* (Doc. 1). The Complaint seeks to enforce the arbitration award and asks the Court to award actual damages, costs, attorney's fees, and any other relief the Court may deem just and proper.[3] On October 14, 2015, ATU filed a Motion for Judgment on the Pleadings, which First Student opposed. First Student also filed a Motion to Stay, which this Court granted by Memorandum Opinion and Order on November 24, 2015, pending the resolution of the review proceedings before the Board. Though in its Memorandum Opinion granting a stay the Court expressed skepticism that ATU's complaint could survive in light of the Supremacy Doctrine, the Court allowed the parties to request additional briefing once the Board had ruled on ATU's Request for Review.

ARGUMENT

I. THE BOARD'S MOTION TO INTERVENE SHOULD BE GRANTED.

The Board meets the requirements for intervention as of right under Rule 24(a)(2) and for permissive intervention under Rule 24(b)(2). *See* Fed. R. Civ. P. 24(a)(2), (b)(2).

[3] On October 29, 2015, First Student filed an unfair labor practice charge with Region 6 (docketed as Board Case No. 06-CB-162952) asserting that by filing its suit for enforcement of the arbitration award, ATU is "restraining and coercing employees in the exercise of their Section 7 rights to select their bargaining representative" and "attempting to cause First Student to discriminate against employees by unlawfully recognizing ATU as their bargaining representative" in violation of Sections 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(A) and (b)(2). On December 16, 2015, the RD informed the parties that the charge was being held in abeyance pending the Board's resolution of the pending request for review involving the RM and UC petitions. (Exhibit 1). As of this filing, that charge has not been resolved.

A. The Board qualifies to intervene as of right under Rule 24(a)(2).

Under Rule 24(a)(2) of the Federal Rules of Civil Procedure, a court must permit intervention as of right if the following four elements are met:

> (1) the application for intervention is timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter by the disposition of the action; and (4) the interest is not adequately represented by an existing party in the litigation.

United States v. Territory of Virgin Islands, 748 F.3d 514, 519 (3d Cir. 2014); *see also Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 365-66 (3d Cir. 1995). Rule 24 is construed liberally in favor of intervention. *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001); *U.S. v. Union Elec. Co.*, 64 F.3d 1152, 1158 (8th Cir. 1995); *Purnell v. City of Akron*, 925 F.2d 941, 950 (6th Cir. 1991); *Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967) (change in Rule 24 underscores "the need for a liberal application in favor of permitting of intervention"); *Clark v. Sandusky*, 205 F.2d 915, 919 (7th Cir. 1953) (finding Rule 24 should be liberally construed to avoid multiple suits and to settle all related controversies in one action); 7C Charles Alan Wright et al., *Federal Practice & Procedure* § 1904 (3d ed.).

1. The Board's motion is timely.

Determining whether a motion to intervene is timely "is not just a function of counting days; it is determined by the totality of the circumstances." *United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1181 (3d Cir. 1994); *see also* Wright et al. § 1916. The Third Circuit evaluates timeliness using three factors—"(1) [h]ow far the proceedings have gone when the movant seeks to intervene, (2) [the] prejudice which resultant delay might cause to other parties, and (3) the reason for the delay." *In re Fine Paper Antitrust Litig.*, 695 F.2d 494, 500 (1982). "[T]he critical inquiry is: what proceedings of substance on the merits have occurred?" *Mountain*

Top Condo. Ass'n, 72 F.3d at 369 (finding intervention would not prejudice the parties four years into litigation).

At present, there is no ruling on ATU's Motion for Judgment on the Pleadings and First Student's Opposition. Recognizing the important effect a Board decision will have on this litigation, the Court stayed the case pending the Board's resolutions of the RM and UC petitions. Moreover, in its Memorandum Opinion granting the stay, the Court provided the parties an opportunity to request additional briefing when they jointly notify the Court of the status of the Board proceedings. Because the case is already stayed, with the prospect of additional time for further briefing, and because the Board's intervention would not require any discovery that would delay the resolution of this litigation, there is no prejudice to the present parties to permit the Board to intervene.

2. <u>The Board has a substantial legal interest in this case.</u>

To meet the sufficient interest test, an intervenor must assert a cognizable legal interest, not merely an "interest[] of general and indefinite character." *Harris v. Pernsley*, 820 F.2d 592, 601 (3d Cir. 1987) *quoting United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1292 (D.C. Cir. 1980). Congress vested in the Board sole authority to hear and determine questions concerning representation pursuant to Section 9(c) of the NLRA. *See* 29 U.S.C. § 159(c)(1). Courts have recognized that the "legitimate interest of the Board in being able in the district court fairly to protect its jurisdictional claims of exclusive jurisdiction or at least a concurrent jurisdiction . . . is manifest." *Newport News Shipbuilding & Drydock Co. v. Peninsula Shipbuilders' Ass'n*, 646 F.2d 117, 121 (4th Cir. 1981); *see also Pa. Truck Lines v. Int'l Bhd. of Teamsters*, 134 L.R.R.M. 2223, 2229 n.13, 1990 WL 59305, at *5 (E.D. Pa. 1990). Therefore, the Board has an unquestionable interest in protecting its decisions from being undermined by conflicting

arbitration awards, particularly when those decisions resolve questions concerning representation, an area uniquely within the Board's expertise.

3. Absent intervention, the Board's ability to protect its interest may be impaired.

In evaluating the Board's entitlement to intervene, the Court must "assess the practical consequences of the litigation" to determine whether there is a "tangible threat" to the Board's legal interest. *Dev. Fin. Corp. v. Alpha Hous. & Health Care, Inc.*, 54 F.3d 156, 162 (3d Cir. 1995) (citing *Brody ex rel. Sugzdinis v. Spang*, 957 F.2d 1108, 1122 (3d Cir. 1992)); *see also Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d at 368. Should the Court enforce the arbitration award, First Student will be required to take actions inconsistent with the Board's resolution of the representational questions raised by the UC and RM petitions. Thus, without an opportunity to intervene, the Board's interest in protecting its jurisdiction over representational issues will be impaired.

4. The Board's interest is not adequately represented by the present parties.

The Supreme Court stated, in *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972), that "[t]he requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *See also* Wright et al § 1909. ("[I]ntervention ordinarily should be allowed unless it is clear that the party will provide adequate representation for the absentee."). The Third Circuit has found inadequate representation when "although the applicant's interests are similar to those of a party, they diverge sufficiently that the existing party cannot devote proper attention to the applicant's interests." *Spang*, 957 F.2d at 1123; *see also Hoots v. Pennsylvania*, 672 F.2d 1133, 1135 (3d Cir.1982).

The Board's interests are not adequately represented by an existing party in the litigation because the Board's interests are not similar to those of ATU or First Student. ATU seeks enforcement of an arbitration award requiring reinstatement of its members and the payment of monetary damages. First Student seeks to avoid reinstatement for ATU-represented drivers, which would surely create a new conflict with the Teamsters, and payment of monetary damages. The Board's interest, however, is in preserving its jurisdiction over the representational questions that Congress specifically intended it to resolve. *See Amalgamated Util. Workers v. Consol. Edison Co. of N.Y.*, 309 U.S. 261, 269 (1940) (noting that "Congress has in this instance created a public agency entrusted by the terms of its creation with the exclusive authority for the enforcement of the provisions of the Act").

In striving toward its own desired end, First Student has argued for the supremacy of the Board's decision. Still, the Board is in the best position to articulate an argument in defense of its own jurisdiction, particularly in light of the Court's skepticism of First Student's arguments. In its Memorandum Opinion granting a stay, the Court expressed uncertainty about how ATU and First Student have characterized the conflict, stating that it "has some misgivings about whether the Supremacy Doctrine applies" in this case, and noted that neither party has proffered any authority directly on point. Specifically, the Court rejected First Student's argument that ATU raised a representational issue at arbitration and that the RD's decision made a representational finding. In fact, in addressing First Student's arguments, the Court found that even if the RD's decision meant that ATU no longer had the right to represent the drivers who joined the Teamsters and continued working at the Frankstown facility, it would not necessarily mean that ATU's representation rights ceased as to the laid-off drivers who did not join the Teamsters.

The questions that the parties and the Court are grappling with are directly related to representation, an area in which the Board has exclusive jurisdiction and institutional expertise. Thus, the Board's interests in preserving its jurisdiction and effectuating the NLRA are materially different than the interests of the private parties, neither of which can provide the Board adequate representation.

In summary, the Board's timely motion demonstrates a significant legal interest that may be impaired and that is not adequately represented by the present parties; accordingly, the Board is entitled to intervene as of right under Rule 24(a)(2).

B. The Board should be granted permissive intervention under Rule 24(b)(2).

Alternatively, this Court should permit the Board to intervene permissively under Rule 24(b)(2). In relevant part, Rule 24(b)(2) provides that "[o]n timely motion, the court may permit a federal . . . agency to intervene if a party's claim or defense is based on: (A) a statute . . . administered by the . . . agency; or (B) any regulation, order, requirement, or agreement issued or made under the statute[.]" Fed. R. Civ. P. 24(b)(2). Rule 24(b) "requires that intervention be granted liberally to governmental agencies because they purport to speak for the public interest." *Pa. Truck Lines*, 134 L.R.R.M. at 2229 n.13, 1990 WL 59305, at *7 n.13; *see also* Wright et al. § 1912. Construing a prior, less permissive version of Rule 24, the Supreme Court found intervention by a government agency is warranted when a proceeding raises issues concerning an agency's "maintenance of its statutory authority and the performance of its public duties." *SEC v. United States Realty & Imp. Co.*, 310 U.S. 434, 460 (1940). The Board represents just such a public interest in administering the NLRA. *See, e.g.*, *Amalgamated Utility Workers*, 309 U.S. at 267–70.

When considering intervention under Rule 24(b)(2), courts have considered "whether the

proposed intervenors will add anything to the litigation.'" *Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 278 F.R.D. 98, 111 (M.D. Pa. 2011); *see also Sec. Nat'l Ins. Co. v. Amchin*, 309 F.R.D. 217, 223 (E.D. Pa. 2015) (finding federal agency's "expertise in these matters will elucidate the issues in this case and assist in the adversarial process, particularly in light of . . . the [agency's] unique position as a government agency."). As discussed in Section A above, the Board has exclusive jurisdiction over questions concerning representation and can add its considerable expertise to this case without delaying the presently stayed proceedings.

For these reasons, if the Court does not grant the Board intervention as of right, it should grant permissive intervention under Rule 24(b)(2).

CONCLUSION

For all the above reasons, the Board asks that its motion to intervene as of right or permissively be granted.

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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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